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Supreme Court, U.S.
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Supreme Court of the United States

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GREAT WESTERN MINING & MINERAL COMPANY,
Assignee of HRC/NJ, Inc., Assignee of Active
Entertainment Inc.,

Petitioner,

v.

FOX ROTHSCHILD LLP;
THOMAS D. PARADISE, Esq., Partner, Fox Rothschild
LLP; ROBERT S. TINTNER, Esq., Partner, Fox
Rothschild LLP; ADR OPTIONS, INC;
THOMAS B. RUTTER, Esq., CEO, ADR Options

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN C. WEINER, ESQUIRE
Counsel of Record
19 Countryside Drive
Livingston NJ 07039
(973) 220-1986

Attorney for Petitioner

February 14, 2011

234771

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Petitioner, Great Western Mining & Mineral Company ("Great Western") has asserted an independent constitutional claim that an alleged conspiracy violated its right to be heard in an impartial forum in state court. App. 2a. Following the issuance of rulings against Great Western in Pennsylvania state court, respondent ADR Options, Inc. ("ADR Options") CEO and founding shareholder Thomas Rutter ("Rutter") testified in an unrelated matter that several state judges that had ruled for respondent ADR Options and against Great Western had already approached him about employment after they leave the bench. App. 7a, 41a. ADR Options is the largest provider of ADR services in Pennsylvania and the largest private employer of former judges as arbitrators, which it pays handsomely. App. 41a. The Third Circuit in affirming the District Court's orders in dismissing Great Western's Complaint determined "[f]or a judge to approach a party for whom he or she has just ruled to discuss the possibility of working for that party *certainly creates a strong appearance of impropriety*." (emphasis added). App. 42a. In addition, an affidavit was provided by Great Western's former legal counsel James F. Wiley, III ("Wiley") where he acknowledged that respondent Robert S. Tintner, Esq. ("Tintner") a partner at Fox Rothschild LLP ("Fox Rothschild") stated to him, there is "no way that a Philadelphia court is ever going to find against Thomas Rutter given his relationship with the Philadelphia court system". App. 41a. Great Western's complaint was dismissed as not plausibly suggesting the existence of a conspiracy under *Bell Atlantic Corporation* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 129 S.Ct. 1937 (2009). App. 42a.

The questions presented:

Since pleading standards govern access to judicial recourse; if properly stating a conspiracy claim requires the addition of a fact that the plaintiff cannot know *ex ante*; would not the pleading standard represent an insurmountable barrier to access in certain cases, violating one's procedural and substantive due process rights in effectively denying their access to the court's of the United States?

Since the arrival of *Twombly* and then *Iqbal*, the thirteen circuits of the United States Court of Appeals has established numerous distinct interpretations of the pleading standard causing not so much as a circuit split as a shatter. Doesn't this uncertainty undermine *Twombly* and *Iqbal* and warrant this Court's review?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties below are listed in the caption.

RULE 29.6 STATEMENT

Great Western Mining & Mineral Company has no parent corporation or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Great Western Mining & Mineral Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159 (3d Cir. 2010). App. 1a-44a.The Order of the United States Court of Appeals for the Third Circuit denying Great Western's Petition for Panel Rehearing and En Banc Rehearing is dated October 15, 2010 and is not reported. App. 72a-73a.

The opinion of the United States District Court for the District of New Jersey – Newark is not reported. App. 56a-70a. The letter order of the United States District Court for the District of New Jersey – Newark is not reported. App. 47a-55a.

STATEMENT OF JURISDICTION

The Third Circuit entered judgment on August 5, 2010. App. 45a. The Third Circuit denied Great Western's Petition for Panel Rehearing and En Banc Rehearing on October 15, 2010. App. 72a-73a. An extension of time to file a petition for writ of certiorari was granted on January 10, 2011 to and including February 12, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. Proc. 8(a)(e)

Rule 8. General Rules of Pleading

(a) Claims for Relief:

A pleading that states a claim for relief must contain:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(e) Construing Pleadings.

Pleadings must be construed so as to do justice.

STATEMENT OF THE CASE

Having lost in state court, Great Western brought an independent civil rights action in federal court under 42 U.S.C. § 1983. Great Western alleged that its state-court losses were the result of a corrupt conspiracy between the named respondents and certain members of the Pennsylvania state judiciary to exchange favorable rulings for future employment as arbitrators with respondent ADR Options, an alternative dispute resolution entity. App. 2a. ADR Options is the largest provider of ADR services in Pennsylvania and the largest private employer of former judges as arbitrators, which it pays handsomely. App. 41a.

The underlying case originated out of a Pennsylvania common law binding arbitration at ADR Options before its CEO and founding shareholder Thomas Rutter, an attorney who was selected as the lone arbitrator. App. 3a. The case before Rutter was a legal malpractice action against attorneys Gary Brownstein, Marc D. Vitale ("Vitale"), and their law firm Brownstein and Vitale, P.C. App. 3a.

The selection of Rutter was conditional and based upon full disclosure of relationships as contained in the ADR Options arbitration agreement, which provided:

> "Each party and participating attorney has disclosed any past or present relationship with the arbitrator, direct or indirect, whether financial, professional, social or any other kind. The arbitrator has also disclosed any past or present relationship with any party or attorney. It is understood that any doubt has been resolved in favor of disclosure." App. 4a.

On the morning of the arbitration Rutter, Vitale and Vitale's attorney at Fox Rothschild executed and affirmed the arbitration agreement without making any disclosures. Rutter thereafter entered a decision for Vitale and against Great Western. App. 4a.

Following Rutter's ruling it was learned that the attorney at Fox Rothschild that had represented Vitale had failed to disclosure his relationship and his law firm's relationship with Rutter and ADR Options. App. 4a. This included the concurrent employment of Fox Rothschild's managing partner at ADR Options. App. 4a.

Thereafter, during the course of unsuccessful litigation in Pennsylvania state court, attorney Robert S. Tintner, a partner at Fox Rothschild that was representing Fox Rothschild's litigation interests contacted Great Western's legal counsel James F. Wiley, III and stated to him there is "no way that a Philadelphia court is ever going to find against Thomas Rutter given his relationship with the Philadelphia court system". App. 5a, 41a. Wiley

memorialized his conversation in an affidavit provided to Great Western. A civil rights action in federal court under 42 U.S.C. § 1983 later ensued.

Following dismissal of Great Western's complaint in District Court, and during the pendency of its motion for reconsideration Great Western learned on March 20, 2009 that Vitale was an attorney for ADR Options and Rutter, and their attorney/client relationship had not been disclosed to Great Western. App. 4a, 5a. Great Western did not discover this information until after the state-court litigation. App. 4a, 5a.

Shortly thereafter, in May 2009, Rutter testified at a deposition in an unrelated matter that several state judges that had ruled for ADR Options and against Great Western had already approached him about employment after they leave the bench. App. 7a, 41a.

Great Western immediately presented the newly disclosed and discovered evidence to the district court through a motion for leave to amend the complaint to its pending motion for reconsideration. App. 7a. The district court denied reconsideration. App. 7a. A timely appeal to the Third Circuit was filed.

The Third Circuit in affirming the District Court's orders in dismissing Great Western's Complaint determined "[f]or a judge to approach a party for whom he or she has just ruled to discuss the possibility of working for that party *certainly creates a strong appearance of impropriety.*" (emphasis added). App. 42a. Yet this allegation, without a complementary allegation of conduct by the non-judicial actor, does not plausibly suggest the

existence of a conspiracy between the party and the judge to exchange favorable rulings for future employment. App. 42a.

The state of mind of Rutter and the other respondents required the addition of facts that petitioner Great Western could not know *ex ante*. Great Western's complaint did, however, plead facts based on information and belief that could only be in the possession and control of the respondents.

The opinion of the Third Circuit provides an in depth statement of the case.

The basis for federal jurisdiction in the District Court was conferred under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

REASONS FOR GRANTING THE PETITION

I. Since the Arrival of *Twombly* and Then *Iqbal*, the Thirteen Circuits of the United States Court of Appeals has Established Numerous Distinct Interpretations of the Pleading Standard Causing not so Much as a Circuit Split as a Shatter. This Uncertainty Undermines *Twombly* and *Iqbal*.

Much confusion turns upon conflicting precedent. On the one hand, upon ruling on a motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) a court must construe the complaint in the light most favorable to the plaintiff, accept its allegations as true and draw all reasonable inferences in favor of the plaintiff. *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). On the other hand, ultimately, the determination of whether a plaintiff's claim is plausible, is a context specific task that requires the reviewing court (or lone judge) to draw on its judicial experience and common sense. *Iqbal* at 1950. The judge's personality comes into play and dismissal is often dependant upon whether he (or she) is rather cynical or leans more to being trusting and hopeful. Too much discretion to dismiss claims is now based on hunches, politics and policy animosity.

> "On the one hand, the Supreme Court had adopted a "plausibility" standard, but on the other hand, it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8." *Swanson v. Citibank*, N.A.., 614 F.3d 400, 403 (7th Cir. 2010). "Critically, in none of the three recent decisions - *Twombly*, *Erickson*, or *Iqbal*

> - did the Court cast any doubt on the validity of Rule 8 of the Federal Rules of Civil Procedure." *Id.*, See *Erickson* v. *Pardus*, 551 U.S. 89 (2007). "To the contrary: at all times it has said that it is interpreting Rule 8, not tossing it out the window." *Id.*

Swanson clarified the Seventh Circuit's pleading standard. The majority evaluated this Court's "plausibility" standard and struggled with the question of how much higher this Court meant to set the bar when it decided *Twombly*, *Erickson*, and *Iqbal*. The majority emphasized that Rule 8 has never been abandoned, and this "Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system." *Swanson* at 404. As *Erickson* underscored, "[s]pecific facts are not necessary." *Id.* "We know that because it said so in *Erickson*, 'the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests'". *Id.*

Given the continued validity of notice pleading, the majority held that under the new requirement referenced in *Twombly* and repeated in *Iqbal*, it is the pleaders responsibility to "state a claim to relief that is plausible on its face" *Id.* "Plausibility" in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not." *Id.* "As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen." *Id.* "For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the

plaintiff's inferences seem more compelling than the opposing inferences." *Id.*

As applied to Great Western, those questions that were determined adversely by the Third Circuit would have received favorable consideration in the Seventh Circuit. Great Western certainly provided enough details about the subject-matter of the case to present a story that held together.

See also *Arista Records, LLC* v. *Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) where the Second Circuit declared "[t]he *Twombly* plausibility standard, which applies to all civil actions, *see Iqbal*, 129 S.Ct. at 1953, does not prevent a plaintiff from "pleading facts alleged `upon information and belief" where the facts are peculiarly within the possession and control of the defendant, see e.g. *Boykin* v. *KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008).""" Again, Great Western's proposed Amended Complaint 3 contained such allegations, yet in the Third Circuit, dismissal was appropriate under their distinct interpretation of *Twombly* and *Iqbal*.

Due to circuit splits within the Court of Appeals in interpreting this Court's decisions in *Twombly* and *Iqbal* inconsistent dismissal of cases has occurred, and will continue to occur.

This uncertainty undermines *Twombly* and *Iqbal*. Immediate review is necessary to assure consistent pleading standards throughout the judicial circuits.

When the day is done, pleading standards must be rebalanced so that meritorious complaints survive;

complaints that require the addition of facts that the plaintiff cannot possibly know without some form of discovery, receive it; and meritless complaints are dismissed. Until this is accomplished, in their present form, pleading under *Twombly* and *Iqbal* protect the secrecy of co-conspirators who now can act with little fear of pre-trial discovery.

II. If Properly Stating a Claim Requires the Addition of Facts that the Plaintiff Cannot Know *Ex Ante*; the Pleading Standard Represents an Insurmountable Barrier to Judicial Access, Judicial Recourse, and Violates a Plaintiff's Procedural and Substantive Right to Due Process in all Courts of the United States.

If properly stating a claim requires the addition of facts that the plaintiff cannot know *ex ante*; the pleading standard represents an insurmountable barrier to access in certain cases. This holds especially true in the initial stages of a conspiracy case when direct evidence is rarely available and the existence of a conspiracy must usually be inferred from the circumstances. This is attributable to the fact that a successful conspiracy is cloaked in silence.

Since pleadings must be construed so as to do justice under Fed. R. Civ. Proc. 8(e), in all cases, is justice being served by the legal precedents of *Twombly* and *Iqbal*? The Fifth and the Fourteenth amendments to the United States Constitution guarantee all citizens the right of procedural and substantive due process in all courts of the United States. However, when pleading standards restrict access to judicial recourse, aren't a plaintiff's constitutional rights being violated?

Immediate review is necessary to resolve this important federal question.

III. This Important Issue Should Be Addressed Now; It is in our Nation's Interest to Ensure the Judiciary is Free From External Influences and Beholden to No One.

There is an extraordinary pubic interest in a clear and immediate resolution of this question, which as the Third Circuit declared during oral argument, can only be determined upon the allowance of discovery. The Third Circuit, however, was constrained by this Court's decisions in *Twombly* and *Iqbal* which required the dismissal of this case. Pleading standards govern access to judicial recourse. This Court should not wait for further circuit splits within the Court of Appeals and the continued erosion of *Twombly* and *Iqbal* before redressing this issue.

"A judge must avoid all impropriety and appearance of impropriety." Code of Conduct for United States Judges (2009), Canon 2A, Commentary. "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." Id.

What negative connotations must be drawn from the Third Circuit's determination that in this case, not merely the appearance of impropriety, but the *strong* appearance of impropriety was certainly present?

In the context of this case, it is important that not one, but several judges that had ruled for ADR Options and against Great Western had approached Rutter. While it may be reasonable to infer that a single appearance of impropriety could be attributable to the independent behavior of a rogue judge; being improperly approached by several judges that all took part in the same case line that ruled for ADR Options and against Great Western certainly suggests a conspiratorial agreement or understanding through evidence of improper parallel conduct; improper judicial conduct that cannot be likely explained away by proper judicial conduct as a result of their conduct's *strong* appearance of impropriety.

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. Code of Conduct for United States Judges (2009), Canon 1, Commentary. "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." Code of Conduct for United States Judges (2009), Canon 2A, Commentary.

Immediate review is necessary.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN C. WEINER, ESQUIRE
Counsel of Record
19 Countryside Drive
Livingston NJ 07039
(973) 220-1986
w2runner@comcast.net

Attorney for Petitioner

February 14, 2011

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 5, 2010

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3189

GREAT WESTERN MINING &
MINERAL COMPANY,
Assignee of HRC/NJ, Inc., Assignee of Active
Entertainment Inc.,

Appellant

v.

FOX ROTHSCHILD LLP;
THOMAS D. PARADISE, Esq., Partner, Fox
Rothschild LLP; ROBERT S. TINTNER, Esq.,
Partner, Fox Rothschild LLP; ADR OPTIONS, INC.;
THOMAS B. RUTTER, Esq., CEO, ADR Options

On Appeal from the District Court
for the District of New Jersey
(No. 08-cv-1093)
District Judge: Honorable William H. Walls

August 5, 2010, Opinion Filed

Argued March 25, 2010

JUDGES: Before: McKEE, Chief Judge, and FUENTES and CHAGARES, Circuit Judges.

Benjamin C. Weiner, Esq. (ARGUED)
19 Countryside Drive
Livingston, NJ 07039

Counsel for Appellant

Thomas A. Cuniff, Esq. (ARGUED)
Fox Rothschild LLP
997 Lenox Drive
Building Three
Lawrenceville, NJ 08648

Counsel for Appellees

OPINION OF THE COURT

FUENTES, *Circuit Judge:*

Having lost in state court, Great Western Mining & Mineral Company ("Great Western") brought a civil rights action in federal court under 42 U.S.C. § 1983. Great Western alleges that its state-court losses were the result of a "corrupt conspiracy" between the named defendants and certain members of the Pennsylvania state judiciary to exchange favorable rulings for future employment as arbitrators with ADR Options, Inc. ("ADR Options"), an alternative dispute resolution entity. The District Court dismissed Great Western's complaint for failure to state a claim and denied its motion for reconsideration and motions for leave to amend its complaint.

Appendix A

As a threshold matter, we address Defendants' contention that the *Rooker-Feldman* doctrine precludes the exercise of subject matter jurisdiction over this action. We disagree, as Great Western is not "complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). Rather, Great Western asserts an independent constitutional claim that the alleged conspiracy violated its right to be heard in an impartial forum. Turning to the merits, we conclude that granting Great Western leave to amend would have proved futile as even the final version of its complaint failed to plead facts plausibly suggesting a conspiratorial agreement. Accordingly, we will affirm.

I.

This case originates out of a dispute involving a miniature golf course in which Active Entertainment, Inc. ("Active") was the losing party.[1] Active retained Brownstein & Vitale, P.C. ("B&V") to represent it in litigation against an entity that Active had hired to build a miniature golf course. Dissatisfied with the damages awarded in that litigation, Active brought a malpractice suit against its counsel, Gary Brownstein, Marc D. Vitale,

1. These facts are taken from the allegations made in the Complaint, which, on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must accept as true and view in the light most favorable to the plaintiff. *Umland v. PLANCO Fin. Servs.*, 542 F.3d 59, 64 (3d Cir. 2008).

and B&V. All parties agreed to binding arbitration before Thomas Rutter and Rutter's company, ADR Options. James F. Wiley, III, represented Active; Thomas Paradise, a partner at Fox Rothschild LLP ("Fox Rothschild"), represented Vitale.

According to the Complaint, ADR Options is the largest provider of alternative dispute resolution ("ADR") services in Pennsylvania, New Jersey, and Delaware. Rutter is the founding shareholder and Chief Executive Officer of ADR Options. Many of ADR Options's arbitrators are former federal and state judges.

Before beginning arbitration proceedings, the parties entered into a binding ADR Options Arbitration Agreement, which provided that:

> Each party and participating attorney has disclosed any past or present relationship with the arbitrator, direct or indirect, whether financial, professional, social or any other kind. The arbitrator has also disclosed any past or present relationship with any party or attorney. It is understood that any doubt has been resolved in favor of disclosure.

(J.A. at 114 [Proposed Am. Compl. 3, P 14].) The result of the arbitration proceedings was an award for defendants Brownstein, Vitale, and B&V. Thereafter, Great Western became the assignee of Active's interest.

Great Western filed a petition in Pennsylvania state court to vacate the arbitration award on the ground

of improper failure to disclose potential conflicts. In particular, Great Western alleged that the managing partner at Fox Rothschild, Louis Fryman, was concurrently employed at ADR Options as an arbitrator and that Paradise maintained a professional relationship with Rutter.[2] The Philadelphia Court of Common Pleas and the Superior Court of Pennsylvania ruled against Great Western and confirmed the arbitration award. The Supreme Court of Pennsylvania denied Great Western's petition for allowance of appeal.

While its appeal was pending before the Superior Court of Pennsylvania, Great Western filed a separate civil action in the Philadelphia Court of Common Pleas against Rutter, ADR Options, Fox Rothschild, and Paradise, raising contract and tort claims and alleging a failure to disclose the purportedly improper relationships. Robert Tintner, a partner at Fox Rothschild, represented all of the defendants. The Court of Common Pleas dismissed the action as collaterally estopped, and Great Western appealed. According to Great Western's counsel, Wiley, shortly thereafter Tintner called Wiley and informed him that "[t]here [was] no way that a Philadelphia court [was] ever going to find against Thomas Rutter given his relationship with the Philadelphia court system." (J.A. at

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2. In its federal Complaint, Great Western further alleged that Vitale was an attorney for ADR Options and Rutter. (J.A. at 124 [Proposed Am. Compl. 3, P 82].) Great Western acknowledged, however, that it did not discover this information until after the state-court litigation. (Great Western Br. 7.) As such, this allegation was not included in Great Western's petition to vacate the arbitration award.

118 [Proposed Am. Compl. 3, P 43].) The Superior Court of Pennsylvania affirmed the decision of the Court of Common Pleas dismissing the action, and the Supreme Court of Pennsylvania denied Great Western's petition for allowance of appeal.

Thereafter, Great Western filed a federal action under 42 U.S.C. § 1983, claiming deprivations of procedural and substantive due process. As defendants, Great Western named Fox Rothschild, Paradise, Tintner, ADR Options, and Rutter (collectively, "Defendants"). Great Western alleged that the Pennsylvania state-court decisions were corrupted by the improper influence of Defendants, arising both from the Pennsylvania courts' reliance on Rutter's services and from Pennsylvania judges' prospect of future employment with ADR Options. Specifically, Great Western claimed that "Defendants had the power yet failed to take action to prevent violation of Great Western's constitutional rights to due process." (J.A. at 127 [Proposed Am. Compl. 3, P 105]). The District Court granted Defendants' motion to dismiss for failure to state a claim, holding that Great Western had not sufficiently alleged that Defendants acted under color of state law. The District Court reasoned that the corruption alleged by Great Western "exists only to the extent that defendants conspired with the courts to ensure the outcome of the underlying case" and concluded that Great Western had failed to properly allege the existence of a conspiracy between Defendants and the Pennsylvania state court system. *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, No. 08-cv-1093, 2009 WL 704335, at *4 (D.N.J. Mar. 16, 2009).

Thereafter, Great Western filed a motion for reconsideration and for leave to amend its complaint pursuant to Federal Rules of Civil Procedure 59(e) and 15(a), attaching a draft amended complaint ("Proposed Amended Complaint 1"). While the reconsideration motion was pending, Great Western filed a second motion for leave to amend, seeking to substitute a new proposed draft amended complaint ("Proposed Amended Complaint 2"), which was attached. Several weeks later and without a ruling on the first two motions to amend, Great Western filed a third motion for leave to amend, seeking to substitute yet another proposed draft amended complaint ("Proposed Amended Complaint 3"), which was attached. In this motion, Great Western argued that it had newly discovered evidence, specifically Rutter's May 14, 2009 admission under oath in another lawsuit that some of the judges who had ruled against Great Western and for ADR Options had already approached Rutter regarding the prospect of employment upon leaving the bench.

On June 24, 2009, the District Court issued an unpublished Letter Order denying the motion for reconsideration on the merits and denying the three motions for leave to amend as moot. In ruling on the motion for reconsideration, the District Court considered Proposed Amended Complaint 2, but *not* Proposed Amended Complaint 3. In a footnote, the District Court explained that it declined to consider Proposed Amended Complaint 3 because "[t]o allow plaintiff to repeatedly submit drafts of its complaint while plaintiff's original motions are still pending would be prejudicial to defendants." (J.A. at 3.) The District Court denied the

motion for reconsideration, holding that the allegations in Proposed Amended Complaint 2 did not support a conspiracy claim. On appeal, Great Western challenges the District Court's refusal to consider Proposed Amended Complaint 3 and argues that the motion for reconsideration was erroneously denied.

II.

Defendants contest our jurisdiction and that of the District Court, contending that this action is barred by the *Rooker-Feldman* doctrine. Although Defendants raised this argument in their motion to dismiss, the District Court declined to address it and, exercising jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, dismissed Great Western's Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We exercise de novo review over questions of subject matter jurisdiction.[3] *PennMont Sec. v. Frucher*, 586 F.3d 242, 245 (3d Cir. 2009). Moreover, all courts "have an independent obligation to determine whether subject-matter jurisdiction exists." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).

Our standard of review of a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) is plenary. *PennMont Sec.*, 586 F.3d at 245. We review a district court decision refusing leave to amend under Federal Rule of Civil Procedure 15(a) for abuse of discretion. *Bjorgung*

3. To the extent that we have subject matter jurisdiction, we exercise it under 28 U.S.C. § 1291.

v. Whitetail Resort, LP, 550 F.3d 263, 266 (3d Cir. 2008). Likewise, the denial of a motion for reconsideration is reviewed for abuse of discretion. *McDowell v. Phila. Hous. Auth.*, 423 F.3d 233, 238 (3d Cir. 2005).

III.

A. *Rooker-Feldman* Doctrine

In certain circumstances, where a federal suit follows a state suit, the *Rooker-Feldman* doctrine prohibits the district court from exercising jurisdiction. The doctrine takes its name from the only two cases in which the Supreme Court has applied it to defeat federal subject-matter jurisdiction: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983). In a recent decision, the Supreme Court held that the *Rooker-Feldman* doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil*, 544 U.S. at 284. Thus, any discussion of the scope of the doctrine must begin with an examination of its namesake cases.

The Supreme Court characterized the lawsuit at issue in *Rooker* as an attempt "to have a judgment of a circuit court in Indiana, which was affirmed by the Supreme Court of the state, declared null and void, and to obtain

other relief dependent on that outcome." 263 U.S. at 414. Rooker and others, who had lost in state court, sought relief in federal district court, arguing that the state-court judgment was "in contravention of" the United States Constitution. *Id.* at 415. The Supreme Court affirmed the dismissal by the district court for lack of jurisdiction. The Court reasoned that:

> [u]nder the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Id. at 416 (internal citations omitted). In other words, the relief sought by the plaintiffs in federal court required federal appellate review of the state-court judgment, a task entrusted by statute solely to the Supreme Court.

Sixty years later, the Supreme Court revisited the issue in *Feldman*. The plaintiffs in *Feldman* had petitioned the District of Columbia Court of Appeals (the equivalent of a state's highest court, *see* 28 U.S.C. § 1257(b)) for waiver of a court rule that required applicants to the District of Columbia bar to have graduated from an accredited law school. *Feldman*, 460 U.S. at 463. The court denied their requests for a waiver, and the plaintiffs filed a suit in federal district court, challenging the D.C. court's refusal to waive the rule and admit them to the bar or at least permit them to take the bar examination. *See id.* at 468-70, 472-73. The Supreme Court, affirming

the Court of Appeals, reemphasized that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." *Id.* at 482. Thus, insofar as the plaintiffs sought review of the D.C. court's judgments, the district court lacked subject matter jurisdiction. *Id.* at 482. To the extent, however, that the plaintiffs challenged the constitutionality of the bar admission rules themselves, their suit was not barred as it did not "require review of a final state judgment in a particular case." *Id.* at 486.

Twice in *Feldman*, the Supreme Court used the term "inextricably intertwined" to describe the type of claims that plaintiffs may not raise in federal district court. First, the Court addressed the argument that if a plaintiff declined to assert certain constitutional arguments in state court, a federal district court could exercise jurisdiction over those claims as it would not be reviewing an issue decided by the state court. *Id.* at 482 n.16. The Court rejected this line of reasoning, stating that:

> [i]f the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Id. In the second instance, the Court employed the term to distinguish between the plaintiffs' challenge to the constitutionality of the bar rules themselves, which could

proceed in federal district court, and their challenge to the denial of the waiver requests, which was prohibited:

> [I]t is clear that [the plaintiffs'] allegations that the District of Columbia Court of Appeals acted arbitrarily and capriciously in denying their petitions for waiver . . . required the [United States] District Court to review a final judicial decision of the highest court of a jurisdiction in a particular case. These allegations are inextricably intertwined with the District of Columbia Court of Appeals' decisions, in judicial proceedings, to deny [the plaintiffs'] petitions. The [United States] District Court, therefore, does not have jurisdiction over these elements of the [plaintiffs'] complaints.

Id. at 486-87. In other words, any of the plaintiffs' claims contesting the denial of their waivers, even if not raised before the District of Columbia court, were "inextricably intertwined" with judicial decisions by the District of Columbia court and, thus, were barred.

Rooker and *Feldman* established the principle that federal district courts lack jurisdiction over suits that are essentially appeals from state-court judgments, but they offered little instruction on how to apply that principle. Subsequent Supreme Court case law provided little further assistance. Before *Exxon Mobil*, "[t]he few decisions that have mentioned *Rooker* and *Feldman* have done so only in passing or to explain why those cases did not dictate dismissal." *Exxon Mobil*, 544 U.S.

at 287. In *Exxon Mobil*, the Court "granted certiorari to resolve conflict among the Courts of Appeals over the scope of the *Rooker-Feldman* doctrine." *Id.* at 291 (internal citation omitted). At the outset, the Court noted that the doctrine, as variously interpreted in the lower courts, "has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law." *Id.* at 283. The Court found just such an error in the decision on review, in which we had held that "[o]nce ExxonMobil's claims had been litigated to a judgment in state court . . . *Rooker-Feldman* 'preclude[d] [the] federal district court from proceeding.'" *Id.* at 290-91 (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 364 F.3d 102, 104 (3d Cir. 2004)) (alterations in original). We had "rejected ExxonMobil's argument that *Rooker-Feldman* could not apply because ExxonMobil filed its federal complaint well before the state-court judgment." *Id.* at 290. Rather, we had concluded that we lacked jurisdiction because ExxonMobil was "endeavoring in the federal action to 'invalidate' the state-court judgment, 'the very situation,' . . . 'contemplated by *Rooker-Feldman*'s "inextricably intertwined" bar.'" *Id.* at 291 (quoting *Exxon Mobil*, 364 F.3d at 106).

Rejecting such an expansive application of the *Rooker-Feldman* doctrine, the Court held that it is "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before

the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil*, 544 U.S. at 284. The Court emphasized that "*Rooker* and *Feldman* exhibit the *limited circumstances* in which this Court's appellate jurisdiction over state-court judgments precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority." *Id.* at 291 (emphasis added) (internal citation omitted). The Court also clearly distinguished the *Rooker-Feldman* doctrine from preclusion, stating that "properly invoked concurrent jurisdiction [does not] vanish[] if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." *Id.* at 292. "When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court." *Id.* But the "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law." *Id.* at 293. Finally, the Court explained that *Rooker-Feldman* is not implicated "simply because a party attempts to litigate in federal court a matter previously litigated in state court." *Id.* If the matter was previously litigated, as long as the "federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.'" *Id.* (quoting *GASH Assocs. v. Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993)) (further citation omitted).

Breaking down the holding of *Exxon Mobil*, we conclude that there are four requirements that must be met for the *Rooker-Feldman* doctrine to apply: (1) the federal plaintiff lost in state court; (2) the plaintiff "complain[s] of injuries caused by [the] state-court judgments"; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments. *Exxon Mobil*, 544 U.S. at 284. The second and fourth requirements are the key to determining whether a federal suit presents an independent, non-barred claim.

The second requirement--that a plaintiff must be complaining of injuries caused by a state-court judgment--may also be thought of as an inquiry into the source of the plaintiff's injury. *See Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 547 (3d Cir. 2006) ("Here, the district court erred by applying the *Rooker-Feldman* doctrine 'beyond the contours of the *Rooker* and *Feldman* cases,' because Turner's action in the district court did not complain of injuries 'caused by the state court judgment.'" (quoting *Exxon Mobil*, 544 U.S. at 283-84)). But what does it mean for a plaintiff to be complaining of an injury caused by the state-court judgment itself? A look at a few representative cases and examples helps to illuminate this concept. In *Hoblock v. Albany County Board of Elections*, 422 F.3d 77, 87 (2d Cir. 2005), the court posited the following example of a case that would be barred by *Rooker-Feldman* because the state-court judgment itself was the source of the injury:

> Suppose a state court, based purely on state law, terminates a father's parental rights and orders the state to take custody of his son. If the father sues in federal court for the return of his son on grounds that the state judgment violates his federal substantive due-process rights as a parent, he is complaining of an injury caused by the state judgment and seeking its reversal.

To the contrary, when the source of the injury is the defendant's actions (and not the state court judgments), the federal suit is independent, even if it asks the federal court to deny a legal conclusion reached by the state court:

> Suppose a plaintiff sues his employer in state court for violating both state anti-discrimination law and Title VII and loses. If the plaintiff then brings the same suit in federal court, he will be seeking a decision from the federal court that denies the state court's conclusion that the employer is not liable, but he will not be alleging injury from the state judgment. Instead, he will be alleging *injury based on the employer's discrimination*. The fact that the state court chose not to remedy the injury does not transform the subsequent federal suit on the same matter into an appeal, forbidden by *Rooker-Feldman*, of the state-court judgment.

Id. at 87-88 (emphasis added).

The critical task is thus to identify those federal suits that profess to complain of injury by a third party, but actually complain of injury "produced by a state-court judgment and not simply ratified, acquiesced in, or left unpunished by it." *Id.* at 88. In *Hoblock*, after first noting that the "voters' claims in this case seem at first to complain only of the [Board of Elections'] refusal to tally their votes rather than of any injury caused by the state court's judgment," the court clarified that "in refusing to tally the votes, the Board [was] acting under compulsion of a state-court order." *Id.* Specifically, the Board, "had it been left to its own devices, would have counted the 40 absentee ballots," but it was ordered not to do so by the state court. *Id.* at 89. Thus, "the state-court judgment produced the Board's refusal to count the ballots, the very injury of which the voters complain." *Id.*

When, however, a federal plaintiff asserts injury caused by the defendant's actions and not by the state-court judgment, *Rooker-Feldman* is not a bar to federal jurisdiction. *See, e.g., Coles v. Granville*, 448 F.3d 853, 859 (6th Cir. 2006); *Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 719 (4th Cir. 2006). A useful guidepost is the timing of the injury, that is, whether the injury complained of in federal court existed prior to the state-court proceedings and thus could not have been "caused by" those proceedings. *See McKithen v. Brown*, 481 F.3d 89, 98 (2d Cir. 2007); *Turner*, 449 F.3d at 547.

Although this test is seemingly straightforward, application becomes more complicated when a federal plaintiff complains of an injury that is in some fashion

related to a state-court proceeding. For example, in *McCormick v. Braverman*, 451 F.3d 382, 384 (6th Cir. 2006), the plaintiff filed suit in federal court contending that she was the owner of certain real property and that the defendants illegally interfered with her ownership. More specifically, the plaintiff alleged that the defendants engaged in fraud and misrepresentation in state-court divorce proceedings involving the real property at issue. *Id.* at 388. Assessing the plaintiff's allegations, the court held that while some were barred by the *Rooker-Feldman* doctrine, the remainder were "independent" claims over which the federal courts had jurisdiction. The non-barred claims were as follows: (1) the defendants committed fraud and misrepresentation in the divorce proceedings; (2) the defendants intentionally did not make the plaintiff a party to the litigation concerning the order of receivership over the real property; and (3) the defendants committed an abuse of process in the divorce proceedings. *Id.* at 392. Focusing on the source of the alleged injuries, the court held that "[n]one of these claims assert an injury caused by the state court judgments . . . . Instead, Plaintiff asserts *independent claims* that those state court judgments were procured by certain Defendants through fraud, misrepresentation, or other improper means . . . ." *Id.* Even though the injuries of which the plaintiff complained helped to cause the adverse state judgments, these claims were "independent" because they stemmed from "some other source of injury, such as a third party's actions." *Id.* at 393. On the other hand, the court explained that the plaintiff's claim that the state court's "order of receivership in and of itself is illegal and causes Plaintiff harm" sought review of that order and thus was not independent and was barred by *Rooker-Feldman*. *Id.* at 395.

In *Fieger v. Ferry*, 471 F.3d 637, 639 (6th Cir. 2006), an attorney filed a suit in federal court challenging both the refusal of certain Michigan Supreme Court justices to recuse themselves from cases in which he was involved and the constitutionality of Michigan's recusal rule. In light of the "acrimonious and well-publicized dialogue between Fieger . . . and several justices of the Michigan Supreme Court," Fieger sought recusal of four of the justices, but the Justices denied the recusal motions. *Id.* at 639-40 (internal quotation marks omitted). In federal court, Fieger alleged that this failure to recuse violated his constitutional rights and sought a declaratory judgment to this effect. The court held that this claim required review and rejection of the "Justices' past recusal decisions," which were rendered before the federal proceedings, and thus was barred by *Rooker-Feldman*. *Id.* at 644. With respect to Fieger's challenge to Michigan's recusal rule, however, the court held that it was not barred, as "the source of Fieger's alleged injury is not the . . . state court judgments; it is the purported unconstitutionality of Michigan's recusal rule as applied in future cases. Such a claim is independent of the past state court judgments." *Id.* at 646.

As is clear from the preceding discussion, the two key requirements--that the injury must be caused by the state-court judgment and that the plaintiff must invite review and rejection of that judgment--are closely related. Yet, a federal plaintiff who was injured by a state-court judgment is not invariably seeking review and rejection of that judgment. For example, in *Adkins v. Rumsfeld*, 464 F.3d 456, 460 (4th Cir. 2006), current and retired service members whose retirement pay was divided in state

divorce proceedings pursuant to the Uniformed Services Former Spouses' Protection Act brought an action in federal court challenging the statute's constitutionality. The court held that "even if these plaintiffs were 'state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced,' . . . they were *not* 'inviting district court review and rejection of those judgments.'" *Id.* at 464 (quoting *Exxon Mobil*, 544 U.S. at 284). A declaration that the federal statute was unconstitutional as applied would prevent the continued transmission of payments to the plaintiffs' former spouses. *Id.* "Such a declaration would not, however, amount to appellate reversal or modification of a valid state court decree entered in an individual plaintiff's divorce case. At bottom, an examination of the federal constitutional challenge presented here against the [statute] does not require scrutinizing and invalidating any individual state court judgment." *Id.* As such, the plaintiffs' federal suit did not require the prohibited exercise of appellate jurisdiction by the district court. *Id.*

What this requirement targets is whether the plaintiff's claims will require appellate review of state-court decisions by the district court. Prohibited appellate review "consists of a review of the proceedings already conducted by the 'lower' tribunal to determine whether it reached its result in accordance with law." *Bolden v. City of Topeka, Ks.*, 441 F.3d 1129, 1143 (10th Cir. 2006). It is important to distinguish such appellate review from those cases in which "a party attempts to litigate in federal court a matter previously litigated in state court," *Exxon Mobil*, 544 U.S. at 293, or in which "the federal plaintiff and the adverse party are simultaneously litigating the same or a

similar dispute in state court," *Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003) (cited with approval in *Exxon Mobil*). If the matter was previously litigated, there is jurisdiction as long as the "federal plaintiff present[s] some independent claim," even if that claim denies a legal conclusion reached by the state court. *Exxon Mobil*, 544 U.S. at 293 (internal quotation marks & citation omitted; alteration in original). When "the second court tries a matter anew and reaches a conclusion contrary to a judgment by the first court, without concerning itself with the bona fides of the prior judgment," the second, or federal, court "is not conducting appellate review, regardless of whether compliance with the second judgment would make it impossible to comply with the first judgment." *Bolden*, 441 F.3d at 1143. In the case of simultaneous litigation, both suits may proceed under the well-established rule allowing parallel state and federal litigation. *Noel*, 341 F.3d at 1163. In neither of these situations, unlike in a suit seeking review of a state-court judgment, "does *Rooker-Feldman* bar subject matter jurisdiction in federal district court, for in neither situation is the federal plaintiff complaining of legal injury caused by a state court judgment because of a legal error committed by the state court." *Id.* at 1164. Instead, "in both situations, the plaintiff is complaining of legal injury caused by the adverse party." *Id.*

In a case subsequent to *Exxon Mobil*, the Supreme Court again emphasized that *Rooker-Feldman* is a "narrow doctrine" that "applies only in limited circumstances." *Lance v. Dennis*, 546 U.S. 459, 464-66, 126 S. Ct. 1198, 163 L. Ed. 2d 1059 (2006) (internal quotation marks & citations omitted). In light of this admonition, we have recognized that "caution is now appropriate in relying

on our pre-Exxon formulation of the *Rooker-Feldman* doctrine," which focused on whether the state and federal suits were "inextricably intertwined." *Gary v. Braddock Cemetery*, 517 F.3d 195, 200 n.5 (3d Cir. 2008). In *Exxon Mobil*, the phrase "inextricably intertwined" appears only three times, twice in the Court's description of *Feldman* and once in the Court's discussion of the lower court's decision. 544 U.S. at 286 & n.1, 291. The Court deliberately did not rely on this formulation in its jurisdictional analysis, instead employing the four-part inquiry that we have outlined above. *See McCormick*, 451 F.3d at 394 ("In *Exxon*, the Supreme Court implicitly repudiated the circuits' post-Feldman use of the phrase 'inextricably intertwined' to extend *Rooker-Feldman* to situations where the source of the injury was not the state court judgment."). Although the term "inextricably intertwined" was used twice by the Supreme Court in *Feldman*, reliance on this term has caused lower federal courts to apply *Rooker-Feldman* too broadly. The phrase "inextricably intertwined" does not create an additional legal test or expand the scope of *Rooker-Feldman* beyond challenges to state-court judgments. When a federal plaintiff brings a claim, whether or not raised in state court, that asserts injury caused by a state-court judgment and seeks review and reversal of that judgment, the federal claim is "inextricably intertwined" with the state judgment. *See McCormick*, 451 F.3d at 394-95; *Davani*, 434 F.3d at 719; *Hoblock*, 422 F.3d at 86; *see also Bolden*, 441 F.3d at 1141 ("[T]he purpose of the term is to highlight that a challenge to a judgment is barred even if the claim forming the basis of the challenge was not raised in the state proceedings."). The phrase "inextricably intertwined," however, "has no independent content. It is simply a descriptive label attached to claims that meet

the requirements outlined in *Exxon Mobil.*"[4] *Hoblock*, 422 F.3d at 87.

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4. Defendants cite to cases in which, post-Exxon *Mobil*, we relied on our pre-Exxon *Mobil* formulation of the *Rooker-Feldman* doctrine, specifically the "inextricably intertwined" test. Although we cited our pre-Exxon *Mobil* definition of "inextricably intertwined," at bottom, the holdings in these cases rested on the same concerns at issue in *Exxon Mobil*--whether the plaintiff's claim complains of an injury caused by a state-court judgment rendered before the federal proceeding and seeks review and rejection of that judgment. Specifically, in *Taliaferro v. Darby Township Zoning Board*, 458 F.3d 181, 193 (3d Cir. 2006), we held that there was federal subject matter jurisdiction as the federal action "was commenced . . . well before any state court judgment was reached, so the district court could not have been invited to review and reject such a judgment."

In two other cases, we held that the *Rooker-Feldman* doctrine barred the suit because a favorable decision in federal court would require negating or reversing the state-court decision. *In re Madera*, 586 F.3d 228, 232 (3d Cir. 2009); *In re Knapper*, 407 F.3d 573, 581 (3d Cir. 2005). As such, we described the state and federal suits as "inextricably intertwined," using this phrase as a shorthand for the concept that the plaintiff could not "prevail on her federal claim without obtaining an order that would negate the state court[s'] judgment[s]." *In re Knapper*, 407 F.3d at 581 (internal quotation marks & citation omitted; alterations in original).

Accordingly, all three of these cases are consistent with *Exxon Mobil* and with the approach we adopt today. Nevertheless, for the sake of clarity, we should exercise "caution . . . in relying on our pre-Exxon formulation of the *Rooker-Feldman* doctrine," particularly those cases which may be read to suggest that the phrase "inextricably intertwined" created an additional legal test. *Gary*, 517 F.3d at 200 n.5.

As a final step, should the *Rooker-Feldman* doctrine not apply such that the district court has jurisdiction, "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law." *Exxon Mobil*, 544 U.S. at 293. In other words, the federal court must "'give the same preclusive effect to a state-court judgment as another court of that State would give.'" *Id.* (quoting *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523, 106 S. Ct. 768, 88 L. Ed. 2d 877 (1986)) (further citation omitted). As *Exxon Mobil* makes clear, the *Rooker-Feldman* inquiry is distinct from the question of whether claim preclusion (res judicata) or issue preclusion (collateral estoppel) defeats the federal suit. Importantly, preclusion is not jurisdictional. *Id.* "In parallel litigation, a federal court may be bound to recognize the claim- and issue-preclusive effects of a state-court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court." *Id.*

Turning to the instant case, the critical question is whether Great Western is a "state-court loser[] complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284. Clearly, Great Western lost in state court, and the state-court judgments were rendered before Great Western commenced its federal suit. The remaining requirements, however, present closer questions. Great Western alleges an extensive conspiracy among Rutter, numerous attorneys, and various state-court judges to engineer Great Western's defeat in state court. It claims

that, pursuant to this conspiracy, "the court decisions were predetermined prior to the beginning of the hearing." (J.A. at 126 [Proposed Am. Compl. 3, P 93].) As a result, Great Western was purportedly forced to litigate in a rigged system and could not "receive a fair hearing in Pennsylvania against ADR Options and Rutter," in violation of its constitutional rights. (*Id.* [Proposed Am. Compl. 3, P 94].) Does such a claim assert injury caused by state-court judgments and seek review and rejection of those judgments? We think not.

Grappling with similar claims, in two cases the Seventh Circuit has held that *Rooker-Feldman* did not operate to bar the federal proceedings. In *Nesses v. Shepard*, 68 F.3d 1003, 1004 (7th Cir. 1995), the federal plaintiff alleged that his losses in state court were the product of a conspiracy among the judges and the lawyers. The court acknowledged that Nesses "was in a sense attacking the ruling by the state court that he had been inexcusably dilatory in complying with a discovery order; he was in the same sense attacking the decisions themselves that dismissed his suit." *Id.* Another aspect of Nesses's suit could also be viewed as an attack on the state-court judgments:

> Nesses cannot show injury from the alleged conspiracy unless the decision dismissing his suit for breach of contract was erroneous.[5] For

5. Note that even if the state-court decision was justified, a plaintiff could nevertheless be entitled to some relief based on the violation of his or her due process rights, which is an independent injury. *See Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 55

> suppose that although there was this nefarious conspiracy his suit had no merit and so would have failed even if there had been no conspiracy. Then the conspiracy did him no harm and without harm there is no tort.... To show harm and thus keep the present suit alive, Nesses would have to show that the decision by the Indiana court in his suit for breach of contract was erroneous, and that, it may appear, *Rooker-Feldman* bars him from doing.

Id. at 1005 (internal citations omitted). But the *Rooker-Feldman* doctrine, the court concluded, "is not that broad." *Id.* Nesses was not merely claiming that the decision of the state court was incorrect or that the decision itself violated his constitutional rights; such claims would be barred. Instead, because Nesses alleged that "*people involved in the decision violated some independent right of his,* such as the right (if it is a right) to be judged by a tribunal that is uncontaminated by politics, then he [could], without being blocked by the *Rooker-Feldman* doctrine, sue to vindicate that right." *Id.* (emphasis added). Moreover, Nesses could, "as part of his claim for damages," show

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L. Ed. 2d 252 (1978). The Supreme Court has held that plaintiffs who are denied due process can recover mental or emotional distress damages or nominal damages. *Id.* at 262-64, 266 ("Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." (internal citations omitted))

"that the violation caused the decision to be adverse to him and thus did him harm." *Id.* If *Rooker-Feldman* barred jurisdiction, "there would be no federal remedy for a violation of federal rights whenever the violator so far succeeded in corrupting the state judicial process as to obtain a favorable judgment." *Id.*

In *Brokaw v. Weaver,* 305 F.3d 660, 662 (7th Cir. 2002), the plaintiff alleged that her relatives and officials conspired to cause the state to forcibly remove her from her parents' home. She contended that "the defendants conspired--prior to any judicial involvement--to cause false child neglect proceedings to be filed, resulting in her removal from her home in violation of her . . . substantive and procedural due process rights" and explained "that she [wa]s seeking damages for the conspiracy, not for the state court's decision in the child neglect proceeding." *Id.* at 665. The court held that *Nesses* applied as the plaintiff was "alleging that the people involved in the decision to forcibly remove her from her home and her parents . . . violated her constitutional rights, independently of the state court decision." *Id.* Even if the plaintiff would not have suffered any damages from the alleged conspiracy absent the state-court order, her claim was not barred by *Rooker-Feldman* "because her claim for damages is based on an alleged independent violation of her constitutional rights. It was this separate constitutional violation which caused the adverse state court decision." *Id.* at 667; *see also Ernst v. Child & Youth Servs.,* 108 F.3d 486, 491-92 (3d Cir. 1997) (holding that a claim alleging that defendants violated plaintiff's due process rights by making biased recommendations to the state court, resulting in an

improper ruling, was not barred by *Rooker-Feldman* as it was separate from the state-court judgment).[6]

We find the reasoning of the Seventh Circuit persuasive and conclude that it applies here. As in *Nesses*, Great Western, by alleging a conspiracy between Defendants and the Pennsylvania judiciary to rule in favor of Rutter and ADR Options, is attacking the state-court judgments. But, like Nesses, Great Western is not merely contending that the state-court decisions were incorrect or that they were themselves in violation of the Constitution. Instead, Great Western claims that "people involved in the decision violated some independent right," that is, the right to an impartial forum. *Nesses*, 68 F.3d at 1005. The alleged agreement to reach a predetermined outcome in a case would itself violate Great Western's constitutional rights, independently of the subsequent state-court decisions. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."). "[B]ecause [Great Western's] claim for damages is based on an alleged independent

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6. In holding that the *Rooker-Feldman* doctrine did not apply, both *Brokaw* and *Ernst* also relied on an alternative ground--that the plaintiff did not have an opportunity to present the current constitutional claims in state court. *Brokaw*, 305 F.3d at 668; *Ernst*, 108 F.3d at 492. This, however, was an additional reason for concluding that *Rooker-Feldman* is inapplicable when a plaintiff presents a claim in federal court that individuals involved in a state-court decision violated an independent constitutional right. We need not decide today whether this exception to the *Rooker-Feldman* doctrine remains good law following *Exxon Mobil*.

violation of [its] constitutional rights," the source of Great Western's purported injury was the actions of Defendants and members of the Pennsylvania judiciary, not the state-court decisions themselves. *Brokaw*, 305 F.3d at 667. "It was this separate constitutional violation which caused the adverse state court decision" and the injury to Great Western. *Id.*; *accord McCormick*, 451 F.3d at 392. Thus, as the state-court judgments were not themselves the cause of Great Western's alleged injuries, the *Rooker-Feldman* doctrine did not deprive the District Court of jurisdiction over Great Western's claims.

The fact that Defendants' actions, rather than the state-court judgments, were the source of Great Western's injuries is alone sufficient to make *Rooker-Feldman* inapplicable here. Nevertheless, it is worthwhile to discuss the other key requirement--whether Great Western seeks review and rejection of the state-court judgments.

Regardless of the merits of the state-court decisions, if Great Western could prove the existence of a conspiracy to reach a predetermined outcome in state court, it could recover nominal damages for this due process violation. *Carey*, 435 U.S. at 262-64, 266. Great Western's entitlement to such damages could be assessed without any analysis of the state-court judgments. To recover for more than the alleged due process violation, however, Great Western would have to show that the adverse state-court decisions were entered erroneously. *See Nesses*, 68 F.3d at 1005. This is not the type of appellate review of state-court decisions contemplated by the *Rooker-Feldman* doctrine. In both *Rooker* and *Feldman*, the plaintiffs sought to

have the state-court decisions undone or declared null and void by the federal courts. *See Rooker*, 263 U.S. at 414; *Feldman*, 460 U.S. at 468-69, 472-73. The relief requested by the plaintiffs in the federal courts would have required effectively overruling the state-court judgments. This is not the case here. Great Western may, "as part of [its] claim for damages," show "that the [constitutional] violation caused the decision[s] to be adverse to [it] and thus did [it] harm." *Nesses*, 68 F.3d at 1005. A finding by the District Court that state-court decisions were erroneous and thus injured Great Western would not result in overruling the judgments of the Pennsylvania courts. Pursuant to *Exxon Mobil*, a federal plaintiff may not seek "review and rejection" of state-court judgments. 544 U.S. at 284. Here, while Great Western's claim for damages may require review of state-court judgments and even a conclusion that they were erroneous, those judgments would not have to be rejected or overruled for Great Western to prevail. Accordingly, the review and rejection requirement of the *Rooker-Feldman* doctrine is not met, and the District Court properly exercised jurisdiction over Great Western's suit.

Ordinarily, having concluded our jurisdictional inquiry, the next step would be to apply state law to determine the preclusive effect of the prior state-court judgments. Defendants did not raise the issues of res judicata or collateral estoppel in their motion to dismiss or before this Court. Estoppel, as an affirmative defense, may be raised in an answer and is not waived through failure to include it in a motion to dismiss. *See* Fed. R. Civ. P. 8(c), 12(h). Preclusion, however, is not jurisdictional. *Exxon*

Mobil, 544 U.S. at 293. As the parties have not briefed this issue and as we can affirm the District Court on the merits, we need not reach the question of the preclusive effect of the prior state-court judgments. Instead, we turn to the merits of Great Western's arguments that the District Court erroneously denied its final motion for leave to amend the complaint and its motion for reconsideration.

B. Motion for Leave to Amend

As we have discussed, after the District Court granted Defendants' motion to dismiss, Great Western filed a motion for reconsideration and a motion for leave to amend, attaching a draft amended complaint, Proposed Amended Complaint 1. While the motion for reconsideration was pending, Great Western filed two additional motions for leave to amend, each time attaching a new draft amended complaint--Proposed Amended Complaint 2, then Proposed Amended Complaint 3. In ruling on the motion for reconsideration, the District Court considered Proposed Amended Complaint 2, but not Proposed Amended Complaint 3. In a footnote, the District Court explained that "[t]o allow plaintiff to repeatedly submit drafts of its complaint while plaintiff's original motions are still pending would be prejudicial to defendants." (J.A. at 3.) Great Western challenges this ruling by the District Court.

Amendments to pleadings are governed by Federal Rule of Civil Procedure 15(a), which provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should

freely give leave when justice so requires." Interpreting Rule 15(a), the Supreme Court has held:

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). As we have explained, "[d]istrict courts are the experts in the field of applied trial procedure, so appellate courts should not be quick to reverse . . . . That said, we also have acknowledged that the liberal pleading philosophy of the federal rules does limit a district court's discretion to deny leave to amend." *Bjorgung*, 550 F.3d at 266 (citing *Adams v. Gould*, 739 F.2d 858, 864 (3d Cir. 1984)). Further guiding district courts' exercise of discretion, we have held that "if a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile." *Phillips v. County of Allegheny*, 515

F.3d 224, 245 (3d Cir. 2008) (citing *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004)).

The District Court concluded that allowing Great Western to submit a third proposed amended complaint would be prejudicial to defendants and denied leave to amend on this ground. We agree with Great Western that the District Court's conclusion regarding prejudice was erroneous.[7] Nevertheless, we will affirm the District Court on the ground that granting leave to amend would

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7. Although Defendants opposed Great Western's motions for leave to amend before the District Court, they did not argue that granting leave to amend would prejudice them. Similarly, they do not make that argument in their brief on appeal. They contend before us, as they asserted in the District Court, that granting leave to amend would be futile as all versions of Great Western's complaint failed to state a claim on which relief could be granted. In denying leave to amend on the ground of prejudice, the District Court did not articulate specifically how permitting amendment would prejudice Defendants. *See Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 276 (3d Cir. 2001) ("[T]he obligation of the district court . . . is to articulate the prejudice caused by the [amendment] and to balance those concerns against the reasons for [the amendment].").

Nothing in the facts of this case demonstrates any particular prejudice that would have resulted from allowing Great Western to substitute Proposed Amended Complaint 3, as long as the District Court had given Defendants an opportunity to respond. We recognize that the District Court's conclusion that permitting Great Western to repeatedly amend its complaint would prejudice Defendants is entitled to substantial deference. Nevertheless, in light of the record and the absence of a reasoned explanation of how Defendants would be prejudiced by the amendment, we conclude that the District Court erred when it denied Great Western's third motion for leave to amend on grounds of prejudice.

have been futile. *See United States v. Sanchez*, 562 F.3d 275, 279 (3d Cir. 2009) (holding that an appellate court may affirm the result reached by the district court on alternative grounds, provided that the record supports the judgment).

Under Rule 15(a), futility of amendment is a sufficient basis to deny leave to amend. Futility "means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Merck & Co. Sec., Derivative, & ERISA Litig.*, 493 F.3d 393, 400 (3d Cir. 2007) (internal quotation marks & citation omitted). The standard for assessing futility is the "same standard of legal sufficiency as applies under [Federal] Rule [of Civil Procedure] 12(b)(6)." *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). In other words, "[t]he District Court determines futility by taking all pleaded allegations as true and viewing them in a light most favorable to the plaintiff." *Winer Family Trust v. Queen*, 503 F.3d 319, 330-31 (3d Cir. 2007) (citing *In re Alpharma, Inc. Sec. Litig.*, 372 F.3d 137, 153-54 (3d Cir. 2004)). Typically, "[w]e review for abuse of discretion, and there is none where pleading deficiencies would not have been remedied by proposed amendments." *Kanter v. Barella*, 489 F.3d 170, 181 (3d Cir. 2007) (citing *In re Adams Golf, Inc. Secs. Litig.*, 381 F.3d 267, 280 (3d Cir. 2004)). In the instant case, however, the District Court did not consider whether permitting Great Western to amend and substitute Proposed Amended Complaint 3 would have been futile,

thus our review is de novo, applying the same standard that would have been applied by the Court.[8]

To determine whether the substitution of Proposed Amended Complaint 3 would have been futile, we consider the merits of Great Western's motion for reconsideration and the additional allegation contained in that version of the complaint. Specifically, we question whether the addition of the new allegation is sufficient to state a claim under 42 U.S.C. § 1983 such that the District Court should have granted Great Western's motion for reconsideration.

To prevail on a § 1983 claim, a plaintiff must allege that the defendant acted under color of state law, in other words, that there was state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). As relevant to this case, the Supreme Court has held that "[p]rivate parties who corruptly conspire with a judge in connection with [an official judicial act] are . . . acting under color of state law within the meaning of § 1983." *Dennis v. Sparks*, 449 U.S. 24, 29, 101 S. Ct.

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8. In the Order denying Great Western's motion for reconsideration, the District Court evaluated whether allowing Great Western to substitute Proposed Amended Complaint 2 would be futile. The District Court did not assess futility with respect to Proposed Amended Complaint 3, instead declining to consider that version on the ground that it would be prejudicial to Defendants. As we have noted, the refusal to consider Proposed Amended Complaint 3 on the basis of prejudice to Defendants was an abuse of discretion. We see no reason for remand, however, because for the reasons stated in our opinion, it is clear that substituting Proposed Amended Complaint 3 would be futile.

183, 66 L. Ed. 2d 185 (1980); *see also Lugar*, 457 U.S. at 941 ("[A] private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment."). Thus, in order to state a claim under § 1983, Proposed Amended Complaint 3 must have adequately pled the existence of a conspiracy between Defendants, who are private parties, and the judges of the Pennsylvania court system.

In two recent landmark cases, the Supreme Court reexamined Federal Rule of Civil Procedure 8 and the pleading standards that a plaintiff must meet to state a claim that will survive a motion to dismiss under Rule 12(b)(6). The first of these two cases, *Bell Atlantic Corp. v. Twombly*, focused on "the proper standard for pleading [a Sherman Act] antitrust conspiracy through allegations of parallel conduct." 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The Court reaffirmed that "Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief" and that this standard does not require "detailed factual allegations." *Id.* at 555 (internal quotation marks & citation omitted). Moreover, the Court reemphasized that at the motion to dismiss stage, the factual matter in the complaint must be taken as true and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable." *Id.* at 556.

In *Twombly*, however, the Supreme Court announced "two new concepts." *Phillips*, 515 F.3d at 231. First, the

Twombly Court explained that Rule 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." 550 U.S. at 555 n.3. In other words, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)) (alteration in original). The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* Second, the *Twombly* Court rejected the oft-cited Conley standard "'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 561 (quoting *Conley*, 355 U.S. at 45-46). The Court retired this test as "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563.

Applying these general standards to the task of pleading an antitrust conspiracy, the Court explained that:

> [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be

> placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Id. at 556-57. Analyzing the complaint at issue, the Court held that it was insufficient as it failed to "set forth a single fact in a context that suggests an agreement." *Id.* at 561-62. Although the complaint alleged parallel conduct, it gave the Court "no reason to infer that the companies had agreed among themselves to do what was only natural anyway." *Id.* at 566. Finding an "obvious alternative explanation" for the parallel conduct, the Court concluded that the "plaintiffs here have not nudged their claims across the line from conceivable to plausible, [and] their complaint must be dismissed." *Id.* at 567, 570.

The second case, *Ashcroft v. Iqbal*, concerned allegations of discrimination on the basis of race, religion, or national origin in the wake of the September 11, 2001 terrorist attacks. U.S. , 129 S. Ct. 1937, 1942, 173 L. Ed. 2d 868 (2009). The Supreme Court clarified that "[o]ur decision in *Twombly* expounded the pleading standard for 'all civil actions.'" *Id.* at 1953 (quoting Fed. R. Civ. P. 1). Analyzing *Twombly*, the *Iqbal* Court explained that "[t]wo working principles underlie our decision . . . . First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1949-50 (internal citations omitted). In light of these principles, the Court laid out a two-pronged approach:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. . . . When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 1950. With respect to conclusory allegations, the Court clarified that "we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of [such] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Id.* at 1951.

In light of *Twombly*, "it is no longer sufficient to allege mere elements of a cause of action; instead 'a complaint must allege facts suggestive of [the proscribed] conduct.'" *Phillips*, 515 F.3d at 233(quoting *Twombly*, 550 U.S. at 563 n.8) (alteration in original). Noting that "[c]ontext matters in notice pleading," we held that "some complaints will require at least some factual allegations to make out a 'showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 232 (quoting *Twombly*, 550 U.S. at 555). We summed up the *Twombly* pleading standard as follows: "'[S]tating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence

of' the necessary element." *Id.* at 234 (quoting *Twombly*, 550 U.S. at 556). In other words, "there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation." *Id.* at 234-35.

We have held that to properly plead an unconstitutional conspiracy, a plaintiff must assert facts from which a conspiratorial agreement can be inferred. *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1377 (3d Cir. 1992); *see also Startzell v. City of Philadelphia*, 533 F.3d 183, 205 (3d Cir. 2008) (stating that a conspiracy requires a "meeting of the minds") (further citation omitted). This holding remains good law following *Twombly* and *Iqbal*, which, in the conspiracy context, require "enough factual matter (taken as true) to suggest that an agreement was made," in other words, "plausible grounds to infer an agreement." *Twombly*, 550 U.S. at 556. Great Western's Proposed Amended Complaint 3 fails to meet this standard.

Under *Iqbal*, to assess the sufficiency of Proposed Amended Complaint 3, we "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." 129 S. Ct. at 1950. Accordingly, we do not consider any conclusory allegations that there was "a corrupt conspiracy," "an agreement," or "an understanding in place between the Defendants and the Philadelphia judicial system." (J.A. at 112, 119 [Proposed Am. Compl. 3, PP 2, 51].) As the *Iqbal* Court clarified, "we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of [such] allegations" that makes them unacceptable. 129 S. Ct. at 1951.

Appendix A

The Supreme Court has held that "merely resorting to the courts and being on the winning side of a lawsuit does not make [the winning] party a co-conspirator or a joint actor with the judge." *Dennis*, 449 U.S. at 28. Instead, Great Western must plead an agreement between the state court judges and Defendants to rule in favor of ADR Options and Rutter. To properly plead such an agreement, "a bare assertion of conspiracy will not suffice." *Twombly*, 550 U.S. at 556.

Applying *Twombly*, Great Western's statement that "Defendants engaged in a concerted action of a kind not likely to occur in the absence of agreement" is inadequate to properly plead an agreement. (J.A. at 120 [Proposed Am. Compl. 3, P 55].) The factual allegations of agreement on which Great Western rests its claim are as follows: (1) according to Wiley, on or about March 1, 2006, Tintner stated that there was "no way that a Philadelphia court is ever going to find against Thomas Rutter given his relationship with the Philadelphia court system" (*id.* at 118 [Proposed Am. Compl. 3, P 43]); (2) ADR Options is the largest provider of ADR services in Pennsylvania, has a large roster of former judges employed as arbitrators, and pays its arbitrators handsomely; and (3) in May 2009, Rutter testified at a deposition that some of the judges who had ruled for ADR Options and against Great Western had already approached him about employment after they leave the bench. Great Western alleges that these factual allegations, when viewed in concert with the decisions rendered by the Pennsylvania state courts, evidence "unnatural parallelism" and a quid pro quo relationship. (Great Western Br. 18, 20.)

At most, Great Western has alleged that Pennsylvania state-court judges hoped to secure employment with ADR Options after leaving the bench and thus had an incentive to rule in the company's favor. Fatal to its claim, however, Great Western failed to make any factual contentions concerning conduct by Rutter or any of the other Defendants. Specifically, even Proposed Amended Complaint 3 is devoid of allegations that Rutter or any of the Defendants did or said something to the judges to create an understanding that favorable rulings could result in future employment. Instead, the allegations in the complaint, even when viewed in the light most favorable to Great Western, describe unilateral action on the part of certain judges. For a judge to approach a party for whom he or she has just ruled to discuss the possibility of working for that party certainly creates a strong appearance of impropriety. Yet this allegation, without a complementary allegation of conduct by the non-judicial actor, does not plausibly suggest the existence of a conspiracy between the party and the judge to exchange favorable rulings for future employment.

A comparison between the allegations in this case and those in *Dennis*, which the Supreme Court held were sufficient to survive a motion to dismiss, further emphasizes the deficiencies in Great Western's complaint. In *Dennis*, a state court enjoined the plaintiffs from producing minerals from certain oil leases. 449 U.S. at 25. The state appellate court dissolved the injunction as illegal, and the plaintiffs brought a § 1983 claim, contending that "the injunction had been corruptly issued as the result of a conspiracy between the judge and the other defendants,

thus causing a deprivation of property . . . without due process of law." *Id.* at 26. Specifically, the plaintiffs claimed that the private party defendants had bribed the state-court judge to cause him to issue an injunction in their favor. *Id.* at 28. This alleged act of bribery was conduct by the non-judicial defendants that resulted in a corrupt conspiracy to rule against the plaintiffs. In contrast, Great Western's complaint contains no similar allegations of specific conduct by the non-judicial actors that caused the judges to enter into an unlawful conspiracy.

Furthermore, Great Western has not pleaded any facts that plausibly suggest a meeting of the minds between Rutter and members of the Pennsylvania judiciary. *See Twombly*, 550 U.S. at 556 (holding that a plaintiff claiming conspiracy must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement"). The complaint sets forth merely a "conclusory allegation of agreement at some unidentified point[, which] does not supply facts adequate to show illegality." *Id.* at 557. Specifically, Great Western has failed to allege except in general terms the approximate time when the agreement was made, the specific parties to the agreement (i.e., which judges), the period of the conspiracy, or the object [**58] of the conspiracy. *See, e.g., Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989) ("To plead conspiracy adequately, a plaintiff must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose."), *abrogated on other grounds by Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000).

Appendix A

Great Western's Proposed Amended Complaint 3 lacks sufficient factual allegations to create "plausible grounds to infer an agreement," as is required by *Twombly*. 550 U.S. at 556. Any effort to amend by substituting Proposed Amended Complaint 3 therefore was futile, and we in turn affirm the District Court's denial of leave to amend on that ground.[9]

IV.

For the foregoing reasons, we hold that the District Court properly exercised jurisdiction. We will affirm the District Court's denial of Great Western's motion for leave to amend and its motion for reconsideration.

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9. Great Western also appeals the denial of its motion for reconsideration, arguing that reconsideration was warranted based on previously unavailable evidence--Rutter's statement at the May 14, 2009 deposition--and the need to correct clear errors of law. Having thoroughly considered all of Great Western's arguments in favor of reconsideration, we conclude that they are without merit.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED AUGUST 5, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3189

GREAT WESTERN MINING &
MINERAL COMPANY,
Assignee of HRC/NJ, Inc., Assignee of Active
Entertainment Inc.,

Appellant

v.

FOX ROTHSCHILD LLP;
THOMAS D. PARADISE, Esq., Partner, Fox
Rothschild LLP; ROBERT S. TINTNER, Esq.
Partner, Fox Rothschild LLP; ADR OPTIONS, INC.;
THOMAS B. RUTTER, Esq., CEO, ADR Options

On Appeal from the District Court
for the District of New Jersey
(No. 08-cv-1093)
District Judge: Honorable William H. Walls

Argued March 25, 2010

Before: McKEE, *Chief Judge*, and FUENTES and CHAGARES, *Circuit Judges*

Appendix B

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 25, 2010. On consideration thereof, it is now hereby

ORDERED and ADJUDGED that the judgment of the District Court entered June 24, 2009, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. The parties shall each bear their own costs.

ATTEST:

Marcia M. Waldron,
Clerk

Dated: August 5, 2010

APPENDIX C — LETTER ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED JUNE 24, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
William H. Walls
Senior District Judge

Martin Luther King Jr.
Federal Courthouse
50 Walnut Street
Newark, New Jersey 07102

(973) 645-2564
(973) 645-3436 Fax

NOT FOR PUBLICATION
LETTER ORDER
ORIGINAL ON FILE WITH CLERK OF COURT

June 24, 2009

Appearances:

Benjamin C. Weiner
19 Countryside Drive
Livingston, NJ 07039
Attorney for Plaintiff

Thomas A. Cunniff
Fox Rothschild LLP
Princeton Pike Corporate Center
997 Lenox Drive
Building 3
Lawrenceville, NJ 08648-2311
Attorney for Defendants

Appendix C

Re: Great Western v. Fox Rothschild LLP et al., No. 08-1093: Plaintiff's Motion for Reconsideration

Dear Litigants:

Plaintiff Great Western moves for reconsideration of this Court's dismissal of its complaint.

FACTS AND PROCEDURAL BACKGROUND

The facts and procedural history of this matter are detailed in the Court's earlier Opinion. (*See* Opinion (Dkt. Entry No. 16, filed March 26, 2009).) In its initial complaint, plaintiff alleged that decisions of the Philadelphia courts in several matters to which it was a party were corrupted by the improper influence of defendants, arising from both the courts' dependence on defendant Rutter's services as well as the enticement to judges of prospects for future employment in Mr. Rutter's firm. (*See* Compl. ¶¶ 43-36 (Dkt. Entry No. 1).) This Court held that plaintiff had failed to sufficiently plead conspiracy because his allegations were generalized and conclusory. (*See* Opinion at 12.) On March 26, 2009, plaintiff Great Western filed a motion for reconsideration, attaching a draft amended complaint. (*See* Dkt. Entry No. 18, filed March 26, 2009.) After defendants filed a brief in opposition plaintiff requested leave to file a reply. (*See* Dkt. Entry No. 21, filed April 6, 2009.) The Court denied plaintiff's request, (*See* Court's Letter (Dkt. Entry No. 22, filed April 29, 2009).), and plaintiff filed a motion for leave to substitute a proposed draft amended complaint ("Proposed Am. Compl."). (*See* Mot. for Leave to Substitute the Attached

Am. Compl. to Pl.'s Mot. for Recons. (Dkt. Entry No. 23 (filed Apr. 30, 2009).) The Court has not yet ruled on the motion for leave to substitute but solely for purposes of deciding plaintiff's motion for reconsideration, the Court will consider the Proposed Am. Compl.[1]

LEGAL STANDARD

The standard for a motion for reconsideration is an exacting one. Under Fed. R. Civ. P. 59(e), a litigant may move to alter or amend a judgment within ten days of its entry. Similarly, the Local Rules allow a party to Seek a motion for reconsideration if the party believes the judge has overlooked certain matters or controlling decisions in rendering the original decision. *See* L. Civ. R. 7.1(i). The Third Circuit has held that the "purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Cafe, by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (quoting *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)) (internal citations omitted). A reconsideration motion, however, may not be used to relitigate old matters, nor to raise arguments or present

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1. On June 16, 2009, plaintiff submitted yet another motion for leave to substitute, attaching what would be a third proposed amended complaint. (*See* Mot. for Leave to Substitute the Attached Am. Compl. to Pl.'s Mot. for Recons. (Dkt. Entry No. 26, filed June 16, 2009).) To allow plaintiff to repeatedly submit drafts of its complaint while plaintiff's original motions are still pending would be prejudicial to defendants. As such, plaintiffs request to substitute this third draft complaint is denied and the Court does not consider it in deciding plaintiff's motion for reconsideration.

evidence that could have been raised before the entry of judgment. *See* Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2810.1. "A party Seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555, 561 (D.N.J. 2003) *aff'd, Gutierrez v. Gonzales*, 125 Fed. Appx. 406 (3d Cir. 2005) (quoting *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990)). Such motions will only be granted where (1) an intervening change in the law has occurred, (2) new evidence not previously available has emerged, or (3) the need to correct a clear error of law or prevent a manifest injustice has arisen. *See North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). Because reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted "sparingly," *Yurecko v. Port Auth. Trans-Hudson Corp.* 279 F. Supp. 2d 606, 608 (D.N.J. 2003); *See* also *NL Indus. Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516 (D.N.J. 1996), and only when "dispositive factual matters or controlling decisions of law" were brought to the court's attention but not considered. *Yurecko*, 279 F. Supp. 2d at 609; *See* also *Pelham v. United States*, 661 F. Supp. 1063, 1065 (D.N.J. 1987).

Appendix C

DISCUSSION

Plaintiff does not contend that an intervening change in law has occurred and, although plaintiff, as discussed later, makes myriad additions to its allegations, he cannot seriously contend that they are based on evidence that was previously unavailable. Plaintiffs motion for reconsideration can only succeed if "the need to correct a clear error of law or prevent a manifest injustice has arisen." *North River Ins. Co.*, 52 F.3d at 1218. In this vein, plaintiff makes two arguments. First, plaintiff insists that leave to amend must be freely granted under Fed. R. Civ. P 59(e) and 15(a) and that, specifically in civil rights cases, leave to amend must be granted *sua sponte*. Second, plaintiff asserts that the Court erred by applying a heightened pleading standard to plaintiff's conspiracy claim.

Although leave to amend must be granted before dismissal in civil rights cases *sua sponte*, leave should not be granted if "doing so would be inequitable or futile." *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251 (3d Cir. 2007). In this case, granting leave to amend would be futile. Plaintiff's draft amended complaint is replete with legal argument, (*See, e.g.*, Proposed Am. Compl. ¶ 30 (arguing that collateral estoppel could not apply plaintiff's state suit); ¶¶ 33-35 (asserting that the Pennsylvania courts committed errors of law).) and unsupported and speculative allegations. (*See, e.g. id.* ¶ 48 (concluding that Tinter's knowledge was acquired in conversations with his clients, through his representation and his position as partner at defendant

Fox Rothschild); ¶ 51 (concluding that Tinter's statement "reveals an understanding in place")

Even if plaintiff's draft amended complaint did not suffer from these problems, it would not support plaintiff's conspiracy claim. Plaintiff's essential claim has not changed. Plaintiff alleges that the "judiciary was beholden to the authority and influence of defendants." (*See* Proposed Am. Compl. ¶ 94.) Plaintiff's primary factual support for this allegation remains a comment by defendant Robert S. Tinter that "there is no way that a Philadelphia court is ever going to find against Thomas Rutter given his relationship with the Philadelphia court system." (*See* Proposed Am. Compl. ¶ 43.) In its earlier Opinion, the Court concluded "it is not reasonable to infer, solely on the basis of Tinter's comment, that there exists a conspiracy between defendants and the Philadelphia court system." (Opinion at 11-12.) Although plaintiff attempts to amplify the meaning of Tinter's comment, (*See* Proposed Am. Compl. ¶ 97 (concluding that Tinter's statement indicates an agreement was in place between the judiciary and defendants).), such an interpretation conflicts with this Court's conclusion that these comments do not support such an inference. (*See* Opinion at 11-12.)

Plaintiffs draft amended complaint must assert new allegations to survive a motion to dismiss. Plaintiffs new allegations are essentially two. First, plaintiff alleges that "misapplications of law" in the earlier state proceedings are so egregious that they "reflect[] an external undue influence." (*See* Proposed Amended Compl. ¶ 31-39.). Second, plaintiff casts purported delays in a pending state

case brought by ADR Options and Rutter against James F. Wiley, (the "Wiley Case") as indicative of an agreement to evade a ruling against ADR Options or Rutter.[2] (*See* Proposed Am. Compl. ¶ 79.)

Making the most generous inferences, these allegations do not support a conspiracy claim. First, it is implausible to conclude that the decisions of the state courts were so egregious as a matter of law as to allow an inference that they were a product of conspiracy. Such decisions were upheld on appeal and the Pennsylvania Supreme Court declined to review them. (*See* Pl.'s Draft Amended Compl. ¶¶ 21-22; 36-37.) Second, the relevance of the Wiley Case is questionable as it does not involve the plaintiff. Moreover, the purported delays do not support a reasonable inference that the court is under any improper influence. In sum, plaintiff's additional allegations fail to remedy the defects in its original complaint.

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2. Although plaintiff's proposed amended complaint is not clear, it appears that Wiley was counsel to Great Western in the state proceedings. (*See* Pl.'s Draft Amended Compl. ¶ 41.) Plaintiff asserts that the Wiley Case arises from circumstances similar to those underlying the present action, (*See* Pl.'s Draft Amended Compl. ¶ 82-83.), and that the Philadelphia Court of Common Pleas has not ruled on preliminary objections filed against ADR Options and Rutter for seven months, (*See id.* ¶ 72-77.); asserts that ADR Options and Rutter, in response to a request for telephone call logs, time sheets and other records from 2003, responded that the records had been destroyed because it had been more than six years, (*See id.* ¶ 85-86.); and that the court has scheduled trial without ruling on the preliminary objections or resolving outstanding discovery issues. (*See id.* ¶ 80.)

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Plaintiff's argument that the Court improperly applied a heightened pleading standard is also misplaced. As the Court noted in its earlier Opinion, the Third Circuit has made clear that to properly plead conspiracy, the plaintiff must make more than conclusory allegations. (*See* Opinion at 9-10.) Plaintiff quotes the Third Circuit in *Rose v. Bartle* for the proposition that allegations of conspiracy are judged under a liberal pleading standard. (*See* Pl.'s Supp. 3 (quoting *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989).) Contrary to plaintiff's suggestion, this language did not reject the standard this Court applied in dismissing plaintiff's complaint. Rather, this language contrasted the pleading requirements for conspiracy allegations with those for fraud.

Pleadings of fraud are subject to a heightened pleading standard under Rule 9(b) but allegations of conspiracy are not. *See Rose v. Bartle*, 871 F.2d at 366. But this is not to say that allegations of conspiracy can rest on generalized and conclusory allegations. The sentence immediately following the quotation that plaintiff assiduously selected makes clear that "a conspiracy must contain supportive factual allegations." *Id.* The Court, applying this standard, concluded that plaintiff's complaint did not contain sufficient supportive factual allegations. Applying the same standard and making even the most generous inferences, plaintiff's draft amended complaint contains similarly insufficient allegations. Granting leave to amend would be futile. Plaintiffs motion for reconsideration is denied.

Appendix C

CONCLUSION

For the foregoing reasons, it is on this 24th day of June, 2009,

ORDERED that plaintiff's motion for reconsideration is DENIED; it is further

ORDERED that plaintiff's motions for leave to substitute are DENIED as moot.

s/William H. Walls
United States Senior District Judge

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, FILED MARCH 16, 2009

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 08-1093 (WHW)

GREAT WESTERN MINING &
MINERAL COMPANY

Plaintiff,

v.

FOX ROTHSCHILD LLP, THOMAS D. PARADISE, ESQ., ROBERT S. TINTNER, ESQ., ADR OPTIONS INC. and THOMAS B. RUTTER, ESQ.

Defendants.

OPINION

Walls, Senior District Judge

Defendant moves pursuant to Rule 12(b)(6) to dismiss plaintiff's complaint. Defendant's motion is granted.

Appendix D

FACTS AND PROCEDURAL BACKGROUND

A Pennsylvania trial court was spot on when, at a much earlier stage of this protracted dispute, it observed that "[t]his case has a somewhat tortured procedural history." *Great Western Mining & Mineral Company v. Fox Rothschild, LLP*, 2006 Phila. Ct. Com. Pl. LEXIS 225, *1 (2006). The tale begins with a dispute involving a miniature golf course in the state of Pennsylvania. That dispute led to litigation, to which the original assignor of plaintiff Great Western's interest, Active Entertainment, Inc. was the losing party. Dissatisfied with the damages awarded in this miniature golf litigation, Active Entertainment brought a malpractice suit against its counsel, Brownstein & Vitale, P.C.. *See id.* All parties to the malpractice action agreed to binding arbitration before defendant Thomas J. Rutter and Mr. Rutter's arbitration company, defendant in this matter ADR Options, Inc.. *See id.* This arbitration resulted in an award for Brownstein & Vitale. Plaintiff Great Western, then assignee of HRC/NJ Inc., an assignee of Active Entertainment, sought to vacate the arbitration award on the basis that Brownstein & Vitale, defendant Fox Rothschild LLP, Rutter and ADR Options had failed to disclose a relationship among Fox Rothschild, Rutter and ADR Options, Inc.. (Compl. ¶¶ 17- 18.)

The Pennsylvania trial court denied Great Western's motion to vacate the arbitration award. The Superior Court of Pennsylvania affirmed and later denied a motion for rehearing. The Supreme Court of Pennsylvania then denied Great Western's petition for allowance of appeal. (Compl. ¶ 20-21.) Not to be dissuaded by this string of

defeats, Great Western filed a complaint in the Court of Common Pleas, Philadelphia against Rutter and ADR Options as well as defendant Thomas D. Paradise, a partner at Fox Rothschild, alleging anew a failure to disclose the purportedly improper relationship among Rutter, ADR Options and Fox Rothschild, (Compl. ¶ 23.), and grounding its claims on, *inter alia*, breach of contract, fraud and misrepresentation. *See Great Western Mining & Mineral Co. v. Fox Rothschild, LLP*, No. 536 EDA 2006, No. 619 EDA 2006 at 7 n.1 (Sup. Ct. of Pa. 2007).

After allowing two amendments to Great Western's complaint, the Court of Common Pleas dismissed the complaint with prejudice on collateral estoppel grounds. (Compl. ¶ 32.) On February 28, 2006, Great Western's counsel, James F. Wiley, Esq., filed an appeal in the Superior Court on behalf of Great Western. Shortly thereafter, and this is the crux of plaintiff's present persistence, Mr. Paradise's partner at Fox Rothschild, Robert S. Tinter, called Mr. Wiley and informed him that "there [was] no way that a Philadelphia court [was] ever going to find against Thomas Rutter given his relationship with the Philadelphia court system." (Affidavit of James F. Wiley, Esq., dated Feb. 26, 2008.) The Superior Court later affirmed the Court of Common Pleas decision that Great Western was estopped from pursuing its second suit, *See Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, No. 536 EDA 2006, No. 619 EDA 2006 (Non-Precedential Decision) at 12-13 (Sup. Ct. of Pa. 2007), and the Supreme Court of Pennsylvania again denied Great Western's petition for allowance of appeal. *See Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 2008 Pa. LEXIS 1595 (Pa. 2008).

Appendix D

Showing remarkable pluck, on February 28, 2008 Great Western filed the present complaint in the federal court against ADR Options, Rutter, Fox Rothschild, as well as Tinter and Paradise individually, claiming deprivations of procedural and substantive due process. (*See* Compl. ¶¶ 41-49.) Specifically, Great Western alleges the Pennsylvania court decisions were corrupted by the improper influence of defendants, arising from both the Philadelphia court's dependence on Mr. Rutter's services as well as the enticement to Philadelphia judges of prospects for future employment in Mr. Rutter's firm. (*See* Compl. ¶¶ 43-36.)

Defendants now move pursuant to Rule 12(b)(6) to dismiss plaintiffs complaints for failure to state a claim. *See* Fed. R. Civ. Proc 12(b)(6). The motion is granted.

LEGAL STANDARD

On a motion to dismiss pursuant to Rule 12(b)(6), a court is required to accept as true all allegations in the complaint and draw all reasonable inferences in the light most favorable to the non-moving party. *See Umland v. Planco Fin. Servs.*, 542 F.3d 59, 64 (3d Cir. 2008); *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

A complaint will survive a motion under Rule 12(b)(6) if it states plausible grounds for plaintiff's entitlement to the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 1968-69 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957) which held that a "complaint should not be dismissed for

failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief") (emphasis added). This "entitlement to relief" requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. 550 U.S. at 555. In other words, it must contain sufficient factual allegations "to raise a right to relief above the speculative level." Id. The question is whether the claimant can prove any set of facts consistent with his or her allegations that will entitle him or her to relief, not whether that person will ultimately prevail. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984).

While a court will accept well-plead allegations as true for the purposes of the motion, it will not accept unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegation. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25, 27 n. 2 (1977). Moreover, the claimant must set forth sufficient information to outline the elements of his claims or to permit inferences to be drawn that these elements exist. *See* Fed. R. Civ. P. 8(a)(2); *See also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The Court may consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint, and matters of public record. *See Sentinel Trust Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 216 (3d Cir. 2003); see also 5A Wright & Miller, Federal Practice & Procedure § 1357 at 299 (2d ed. 1990). "A 'document integral to or explicitly relied upon in the

complaint' may be considered 'without converting the motion [to dismiss] into one for summary judgment.'" *Mele v. Federal Reserve Bank of N.Y.*, 359 F.3d 251, 255 n.5 (3d Cir. 2004) (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996)). "Plaintiffs cannot prevent a court from looking at the texts of the documents on which its claim is based by failing to attach or explicitly cite them." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

DISCUSSION

Defendants argue that Great Western's claim must be dismissed because plaintiffs have failed to allege that defendants acted under color of state law. (Def.'s Supp. 4-9.) Plaintiffs respond that because defendants were willful participants in joint action with the State they acted under color of law for purposes of § 1983. (Pl.'s Opp. 8.) Defendants labor to fortify their position by asserting that Great Western's claim must be dismissed as a collateral attack, (Def.'s Supp. 9-10.), but the Court need not consider this argument because the Court concludes that plaintiff has not sufficiently alleged that defendants acted under color of state law.

To state a claim under § 1983 plaintiff (1) must allege the violation of a right secured by the Constitution and laws of the United States; and (2) must show that the alleged deprivation was committed by a person acting under color of state law." *Barna v. City of Perth Amboy*, 42 F.3d 809, 815 (3d Cir. 1994) (quoting *West v. Atkins*, 487 U.S. 42, 48, 101 L. Ed. 2d 40, 108 S.Ct. 2250 (1988).

A private defendant acts under the color of state law if the party "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 815-16 (citing *West* at 49). This requirement not only protects individual freedom by limiting the reach of federal judicial power but also avoids imposing on the State responsibility for conduct that cannot be fairly attributed to the State. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744 (1982). It is the former policy goal that is implicated here and reminds the Court that it must respect the limits of its power with regard to private interests by applying governmental limits to private actors only when their acts can be fairly attributed to the State. *See id.*

The *Lugar* court described a two-part approach[1] to determining when attribution to the state is fair. First, the "deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible..." *Lugar* at 937. Second, the private party must be a "person who may fairly be said to be a state actor." Id. Of particular relevance to the present case, the Lugar court observed that "[w]ithout a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.*

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1. Although plaintiff asserts, without citation, 1 that the *Lugar* court "expressly limited its holding to prejudgment attachment", the Court reads the principles represented in *Lugar* as applicable outside the area of prejudgment seizure.

Defendant argues that these actions can be fairly attributed on several grounds: (i) conspiracy, *see, e.g. Dennis v. Sparks*, 449 U.S. 24, 28, 101 S. Ct. 183 (1980); (ii) symbiotic relationship, *see,e.g. Brown v. Phillip Morris, Inc.*, 250 F.3d 789, 803 (3d Cir. 2001); (iii) significant state encouragement, *see, e.g. Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); and (iv) exclusive prerogative. *See, e.g. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353, 95 S.Ct. 449 (1974).

The central issue, however, is whether plaintiff's complaint sufficiently alleges conspiracy. This is not simply because "[p]rivate parties who corruptly conspire with a judge in connection with such conduct are ... acting under color of state law within the meaning of § 1983," *Sparks* at 29, but because focus is properly on the particular action that led to the purported deprivation, rather than simply the identity of the party who commits such act. To resay, simply because a private citizen is a state actor for purposes of one action does not mean he or she is a state actor for purposes of all actions. "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged *action* of the [private entity] so that the action of the latter may be fairly treated as that of the State itself."[2] *Jackson*, 419 U.S. at 351 (citing

2. *Jackson* involved the question of whether a regulated private entity should be treated as a state actor for purposes of due process, exposing the state to liability. Plaintiffs conflate this inquiry with whether liability should be imposed on a private party for actions performed by the State. To avoid making a similar analytical mistake to those made by plaintiffs in their briefing, it is important to clarify that the question in the present case

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-179 (1972)) (emphasis added). "[C]onstitutional standards are invoked only when it can be said that the State is responsible for the *specific conduct* of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777 (1982) (emphasis added); *see also Brown v. Philip Morris, Inc.*, 250 F.3d 789 (3d Cir. 2001) (holding that the marketing activities of private tobacco manufacturer were not rendered state action solely based on federal regulation of its marketing).

The purported constitutional deprivation here is a deprivation of due process due to corruption of the Philadelphia court system. In analysis, this corruption exists only to the extent that defendants conspired with the courts to ensure the outcome of the underlying case. It is irrelevant to the present case that Rutter and/or ADR Options may operate an arbitration business that exists in a symbiotic relationship with the state, receives significant state encouragement or operates in an area that is an exclusive prerogative of the state because plaintiffs do not allege that the deprivation occurred during the arbitration activities of Rutter and ADR Options. Rather,

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is whether plaintiff has alleged a conspiracy between a private entity and a court sufficient to expose the private entity to liability under § 1983. The *Jackson* holding is cited merely to show that the proper inquiry is whether the *actions* of the private entity can be attributed to the government. In the case of conspiracy, they obviously can be so attributed. So if plaintiff has sufficiently alleged a conspiracy, the question of whether ADR Options or Rutter are state actors because of the allegedly close relationship with the state court system is irrelevant.

they claim that improper influence wielded by defendants in their underlying litigation caused the deprivation. This improper influence only exists to the extent there was a conspiracy. But "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S.Ct. 183 (1980).

The Third Circuit applied Lugar in a matter with particular relevance here, *Jordan v. Fox, Rothschild, O'Brien and Frankel*, 20 F.3d 1250 (1994). The *Jordan* plaintiff, Jordan Mitchell, had entered into a lease with his landlord, defendant Berman. *See Jordan* at 1253. After a payment dispute, Berman exercised a confession of judgment clause in the lease and, with the aid of the Sheriff of Philadelphia, garnished Jordan's bank account pursuant to a Pennsylvania law allowing execution on judgments by confession without prior notice or hearing. *See Jordan* at 1253-54. Jordan brought suit against Berman's attorneys, among others, alleging a deprivation of due process. The district court dismissed the suit against the attorneys on qualified immunity grounds. *See Jordan* at 1254. The Third Circuit disagreed with the district court as to qualified immunity but, applying *Lugar*, drew a distinction based on the extent of the cooperation between State and private actor. According to the Jordan court, Mitchell's attorneys had not acted under color of law simply by entering the confession of judgment. At the point of entry they did not "officially invoke the force of law to collect or secure" the disputed funds. *Jordan* at 1266. On its own, the confession of judgment itself was not unconstitutional. *See id.* However, once Jordan's lawyers directly requested that

the sheriff garnish the accounts, the action could be fairly attributed to the state and the attorneys consequently acted under color of law for purposes of §1983. *See id.* at 1267. It was on this basis that the *Jordan* court held "a private party acts under color of law where the individual 'acts together with or has obtained significant aid from state officials.'" *Id.* (quoting *Lugar* at 937).

Defendants draw the unenlightening distinction that, unlike *Jordan's* defendants, they did not execute a writ of attachment on plaintiffs. *Jordan* does not apply solely to the attachment context. But, even if it did, plaintiff says more, suggesting that defendants conspired with the Philadelphia court system to deprive them of due process. A conspiracy of this sort would be akin to the writ of attachment in the *Jordan* case because it would not only constitute a violation of plaintiff's constitutional rights but also necessarily involve the type of cooperation between State and private actors that exposes private actors to §1983 liability under *Lugar*.

Plaintiffs for their part, however, have failed to properly allege conspiracy. To demonstrate an unconstitutional conspiracy a plaintiff must show that two or more conspirators reached an agreement to deprive the plaintiff of a constitutional right. *See Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 700 (3d. Cir. 1993), *abrogated on other grounds by United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). A claim for conspiratorial liability "must ... contain supportive factual allegations." *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989). The factual allegations

supporting the conspiracy claim may not be generalized or conclusory. *See id.*; *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1377 (3d Cir. 1992), *cert. denied*, 506 U.S. 1079, 113 S. Ct. 1045 (1993); *Durre v. Dempsey*, 869 F.2d 543, 545 (10th Cir. 1989). The Third Circuit has provided further guidance in the RICO context by noting that "[t]o plead conspiracy adequately, a plaintiff must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989) *abrogated on other grounds by Beck v. Prupis*, 529 U.S. 494, 505-06, 120 S. Ct. 1608 (2000); *see also Smith v. Bacon*, 699 F.2d 434, 436-37 (8th Cir. 1983) (plaintiff must allege facts showing a "meeting of the minds"); *Polur v. Raffe*, 912 F.2d 52, 56 (2d Cir. 1990) ("It is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal of a claim predicated on a conspiracy to deprive him of his constitutional rights"); *Snell v. Tunnell*, 920 F.2d 673, 702 (10th Cir. 1990) *cert. denied*, 499 U.S. 976, 111 S. Ct. 1622 (1991) ("The participants in the conspiracy must share the general conspiratorial objective.... To demonstrate the existence of a conspiratorial agreement it simply must be shown that there was 'a single plan, the essential nature and general scope of which [was] know[n] to each person who is to be held responsible for its consequences.'") (quoting *Hoffman-La Roche, Inc. v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971)). The Third Circuit has clearly stated that this heightened pleading requirement applies to both § 1983 and § 1985(3) conspiracy claims. *See Startzell v. City of Philadelphia*, 533 F.3d 183, 205

(3d Cir. 2008) (stating that in order to support a § 1983 or a § 1985(3) claim plaintiff must show a "meeting of the minds") (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158, 90 S. Ct. 1598 (1970)).

Plaintiff points to five paragraphs of its complaint in support of the conspiracy. Read together, these paragraphs identify three allegations: first, that the "[j]udiciary was beholden to the authority and influence of certain [d]efendants," (Compl. ¶¶ 5; 43.); second, that, presumably as a result of this devotion, "preliminary objections were sustained in the Court of Common Pleas, Philadelphia" dismissing the complaint, (Compl. ¶ 32.); and third, that Great Western was informed by Mr. Tinter "that it was not possible for it to receive a fair hearing in Pennsylvania against ADR Options and Rutter, and that Great Western could never prevail." (Compl. ¶ 34.)

Allegations of conspiracy must be particularized and plaintiff's allegations are anything but. If defendant hangs its conspiracy hat on any hook it is only Tinter's comment that defendant could not hope to get a fair trial. Tinter's comment does not provide factual support for the conspiracy alleged. Even if, as plaintiff suggests in its brief although not in its complaint, there is a conspiracy between Rutter and ADR Options on the one hand and the Philadelphia court system on the other, Tinter's comment does nothing to support such conspiracy because it does not establish a necessary element of a civil conspiracy, an agreement between defendants and the court system.

Appendix D

Although the Court is cognizant that it must draw all reasonable inferences in plaintiff's favor, *see Umland*, 542 F.3d at 64, it is not reasonable to infer, solely on the basis of Tinter's comment, that there exists a conspiracy between defendants and the Philadelphia court system. Factual allegations supporting the conspiracy claim may not be generalized or conclusory. *See Rose v. Bartle*, *supra*, at 366.

In any event, even if ADR Options were demonstrated to have a symbiotic relationship with the court system via the size of its arbitration practice and even if the Philadelphia courts depend on that service to limit an overwhelming docket, it is not Rutter's or ADR Options's arbitration activities that are the source of plaintiff's alleged constitutional deprivation. It is the decisions of the state courts. While the alleged interdependence of ADR and the courts might tempt a losing party to imagine that an improper relationship exists, plaintiffs must have more than an active imagination to meet the heightened pleading standard for conspiracy. The Court expects that a plaintiff would have a solid factual basis before asserting such significant allegations. By presenting a pleading to the Court, counsel certifies that its factual contentions have evidentiary support. *See* Fed. R. Civ. Proc. 11(b). Violation of this rule is grounds for sanctions. *See* Fed. R. Civ. Proc. 11(c). Counsel is reminded that serious allegations should have correspondingly significant factual support before they are asserted in court filings.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss is granted and plaintiff's complaint is dismissed with prejudice.

/s/**William H. Walls**
United States Senior District Judge

Appearances
Benjamin C. Weiner
19 Countryside Drive
Livingston, NJ 07039
Attorney for Plaintiff

Thomas A. Cunniff
Fox Rothschild LLP
Princeton Pike Corporate Center
997 Lenox Drive
Building 3
Lawrenceville, NJ 08648-2311
Attorney for Defendants

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY, FILED MARCH 16, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 08-1093 (WHW)

GREAT WESTERN MINING
& MINERAL COMPANY

Plaintiff,

v.

FOX ROTHSCHILD LLP, THOMAS D. PARADISE, ESQ., ROBERT S. TINTNER, ESQ., ADR OPTIONS INC. and THOMAS B. RUTTER, ESQ.

Defendants.

ORDER

Walls, Senior District Judge

Defendants have moved to dismiss the complaint. The Court has considered the moving, opposition and reply papers. For the reasons given in the accompanying opinion:

It is on this 16th day of March, 2009, ORDERED that defendants' motion to dismiss is GRANTED; it is further ORDERED that plaintiff's complaint is DISMISSED with prejudice.

s/William H. Walls
United States Senior District Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING, FILED OCTOBER 15, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3189

GREAT WESTERN MINING &
MINERAL COMPANY,
Assignee of HRC/NJ, Inc., Assignee of Active
Entertainment Inc.

Appellant

v.

FOX ROTHSCHILD LLP;
THOMAS D. PARADISE, Esq., Partner, Fox
Rothschild LLP; ROBERT S. TINTNER, Esq.,
Partner, Fox Rothschild LLP; ADR OPTIONS INC.;
THOMAS B. RUTTER, Esq., CEO, ADR Options

Appellees

SUR PETITION FOR REHEARING EN BANC

Present: McKEE, *Chief Judge*, SLOVITER, SCIRICA, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. and VANASKIE, *Circuit Judges*

Appendix F

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT.

/s/ Julio M. Fuentes
Circuit Judge

DATED: October 15, 2010